MOHAMED ABDULLAH TPE ABDUL MAJEED ISMAIL SAH *a*

v.

HABIB MOHAMED ABDUL MAJID

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 31 OF 1983] *b*
7 JANUARY l985

ARBITRATION: *Enforcement of award under s. 27 of the Arbitration Act - Whether award final under s. 17 - Submission by defence that the partnership agreement subject matter of the award was tainted with illegality - This point not brought up during arbitration - Effect.*

c

The plaintiff by an Originating Summons sought leave to enforce an award of the Arbitrator in the same manner as a judgment or order to the same effect. Leave was granted and against such leave the defendant now appeals.

Both parties were partners of a restaurant and the terms of the partnership were contained in a written agreement whereby each of the parties would have exclusive management and control of the said restaurant in alternate years. *d*

The defendant in 1979 refused to hand over the restaurant to the plaintiff. Pursuant to an arbitration clause in the written agreement an arbitrator delivered an award vindicating the rights of the plaintiff.

The defendant applied to the Court to set aside the award. The motion was heard and dismissed. *e*

The plaintiff now seeks to enforce the award under s. 27 of the Arbitration Act 1952 ("the Act").

The defendant submitted that the partnership agreement was unenforceable as it was tainted with illegality. The business was said to be on land held under a Temporary Occupation Licence (TOL) and the business was run under a stall licence both of which were said to be "personal" and non-transferable. *f*

The plaintiff submitted that the award was final under s. 17 of the Act.

Held:
[1] The validity of an award of an arbitrator can still be questioned at the stage of an application to enforce an award. *g*

[2] The partnership agreement amounted to permission for the use of the TOL and the stall licence and did not amount to a transfer of rights.

[Plaintiff granted leave to enforce award with costs.]

Cases referred to: *h*
Hee Cheng v. Krishnan [1955] MLJ 103
Murugesu v. Krishnasamy 3 MC 93
Union Nationale Des Co-operatives Agricoles De Cerals v. Robert Catterall & Co. Ltd. [1959] 1 All ER 721
Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229
Govindaraju v. Krishnan [1962] MLJ 334

i

Legislation referred to:
Arbitration Act 1952, ss. 17, 27

For the plaintiff - D.A. Devadason; M/s. D.A. Devadason
For the defendant - Thara Singh Sidhu; M/s. Thara Singh Sidhu

JUDGMENT

Peh Swee Chin J:

In this originating summons, the plaintiff sought leave of this Court to enforce an award of an arbitrator viz Mr. Humfrey Ball, delivered by him on 17 March 1980 in the same manner as a judgment or order to the same effect. Leave was granted and against such leave the defendant has now appealed.

It would be desirable to set out briefly the events leading to this application for such leave. Both the parties herein became partners of a restaurant known as Barkath Restaurant by a written agreement dated 21 May 1976 allowing each of the parties herein to have exclusive management and control of the said restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management.

For some reason which need not be repeated here, the defendant refused to hand over in 1979, the said business of the restaurant. Pursuant to an arbitration clause in the written agreement and ultimately, the Court appointed the said arbitrator who after a very long hearing, delivered his award aforesaid, vindicating the rights of the plaintiff under the said agreement.

The defendant, not being satisfied with the award applied again to this Court by a notice of motion to set it aside on various grounds. The motion was heard and dismissed on 9 September 1983 and an appeal to Federal Court was filed and subsequently the appeal was not proceeded with for reasons best known to the defendant.

An award of an arbitrator can also be enforced by an action as of right, the cause of action being breach of the condition providing for the arbitration which has already taken place. It is normally the practice to proceed under s. 27 of the Arbitration Act, 1952 (which the plaintiff has done), for leave to enforce it.

Before me, learned counsel for the defendant submitted that the partnership agreement between the parties hereto was unenforceable for having been tainted with illegality. The partnership business was on land held under a temporary occupation licence (TOL) issued by the Land Office, Tampin and carried on under a stall licence issued by the local authorities, and both these licences were "personal" and non-transferable. He cited, *inter alia*, *Hee Cheng V. Krishn*an [1955] MLJ 103 and *Murugesu v. Krishnasamy* 3 MC 93 and other similar cases.

Learned counsel for the plaintiff in answer submitted as follows. The award was final under s. 17 of the Arbitration Act, 1952. The appeal from the dismissal of the above-mentioned motion was withdrawn in the Federal Court. This point of illegality was not raised before the learned arbitrator or the High Court (when the said motion to set aside the award was heard and dismissed).

In my view, the validity of an award of an arbitrator can still be questioned at the stage of an application to enforce the award. In *Union Nationale Des Co-operatives Agricoles De Cereals v. Robert Catterall & Co. Ltd.* [1959] 1 All ER 721, the Court refused leave to enforce the award there but left it to the parties to proceed by action, instead of making the summary

order granting leave to enforce the award, on the ground that the Court there entertained doubt about the legality of the transaction where the palm nuts seller had not obtained a licence laid to be necessary for selling such palm nuts. This point of illegality affecting the validity of an award is thus a recognised ground for contesting the application for leave to enforce such an award.

If it was an acceptable ground for resisting an application for leave to enforce an award, would this position be affected by the fact that it was not pleaded before the arbitrator or the High Court hearing the motion to set aside the same award? *Hee Cheng's* case itself provides very clearly also the answer. Thomson J (as he then was) held to the effect that it would be the duty of the Court to take a point of illegality even the parties before it may not take it when this point clearly arises on the evidence. Learned counsel for the plaintiff's objection to this point being raised at this stage was therefore unacceptable.

The TOL in the instant case contained an express provision that it was not transferable and though the stall licence did not *ex facie* contain a similar express provision, it could be presumed to be so, as this appeared to be a common ground of both counsel.

It is now settled that there is a clear distinction between transfer of rights under a TOL and the permission for the use of such rights under the TOL as explained by Chang Min Tat FJ in *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 upholding once more, the judgment of Ismail Khan J (as he then was) in *Govindaraju v. Krishnan* [1962] MLJ 334. The observation applies equally, if not more, to a stall licence involved in this case, both being personal to holders and non-transferable.

The substance of the partnership agreement did not in my view amount to a transfer of such rights under such TOL or the stall licence but would merely amount to permission for use of such rights under both licences.

For these reasons, I could not accept the submission of learned counsel for the defendant on this point of illegality.

I therefore made an order granting such leave to the plaintiff with costs.

Also found at [1985] 1 CLJ 276